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Draft commentaries to articles 13 and 14 of Part Two of the draft articles

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Article 13

Proportionality

Any countermeasure taken by an injured State shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State.

Commentary

(1) The relevance of proportionality in the regime of countermeasures is widely recognized in both doctrine and jurisprudence. The notion of proportionality was already present more or less explicitly in the seventeenth, eighteenth and nineteenth century doctrine. 1/ Most twentieth century authors, although not all of them, 2/ are of the opinion that a State resorting to countermeasures should adhere to the principle of proportionality. 3/

1/ This notion was clearly implied in the doctrinal position taken, for example, by Grotius, Vattel and Phillimore, that goods seized by way of reprisal were lawfully appropriated by the injured sovereign, "so far as is necessary to satisfy the original debt that caused, and the expenses incurred by the Reprisal; the residue is to be returned to the Government of the subjects against whom reprisals have been put in force". Sir Robert Phillimore, Commentaries upon International Law, vol. III, (London, 1885), p. 32, Adde: Hugo Grotius, De Jure Belli Ac Pacis Libri Tres, Book III, Chapter 2 s., viii 3, The Classics of International Law, International Peace, Division of International Law, J.B. Scott, ed., (Washington, 1925), p. 629; and E. De Vattel, The Law of Nations: or, Principles of the Law of Nature, applied to the conduct and Affairs of Nations and Sovereigns, Book Two, Chapter XVIII 342, J. Chitty, ed., (London, 1834), p. 283.

2/ Anzilotti considered the rule of proportionality as merely a moral norm. D. Anzilotti, Corso di diritto internazionale, vol. I, (Rome, 1928), p. 167. Strupp did not believe in the existence of rules establishing proportions which had to be observed in the exercise of reprisals. K. Strupp, Das völkerrechtliche Delikt, in Stier-Somlo, Handbuch der Völkerrechts, vol. III, (Stuttgart, 1920), Bibliotheca Visseriana, Tomus Secundus, (Leyden, 1924), pp. 568-569.

3/ In this regard, Oppenheim takes the position that "[r]eprisals, be they positive or negative, must be in proportion to the wrong done, and to the amount of compulsion necessary to get reparation". L. Oppenheim, International Law, vol. II, London, 1952, p. 141. In Guggenheim's words "[d]as moderne Völkerrecht weist sodann eine Verpflichtung zur Proportionalität der Repressalie auf". P. Guggenheim, Traité de droit International, vol. II, (Genève, 1954), p. 585.

(2) The prevailing doctrinal view thus recognizes the principle of proportionality as a general requirement for the legitimacy of countermeasures. 4/ Proportionality is a crucial element in determining the lawfulness of a countermeasure in the light of the inherent risk of abuse as a result of the factual inequality of States. It takes into account situations of inequality in terms of economic power, political power, etc., which may be relevant in determining the type of countermeasures to be applied and their degree of intensity. The principle of proportionality provides an effective guarantee inasmuch as disproportionate countermeasures could give rise to responsibility on the part of the State using such measures.

(3) The principle of proportionality has assumed a more precise content in the present century following the First World War, a development concomitant with the outlawing of the use of force. There is no uniformity, however, in the practice or the doctrine as to the formulation of the principle, the strictness or flexibility of the principle and the criteria on the basis of which proportionality should be assessed.

(4) Article 13 lays down the rule of proportionality in providing that a countermeasure "shall not be out of proportion" to the relevant criteria. It adopts the "negative" formulation used, for instance, in the Naulilaa and Air Services awards. 5/ The text does not specify the degree of proportionality

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4/ The distinguished authors who share this view include: M. Bourquin, "Règles Générales du droit de la paix", Haque Rec., vol. 35, 1931 I, p. 223; Hans Kelsen, Principles of International Law, II ed., New York, 1966, p. 21; G. Morelli, Nozioni di Diritto Internazionale, Padova, 1967, p. 262; W. Wengler, Völkerrecht, I, Berlin-Goett.-Heid., 1964, p. 21; O. Schachter, "International Law in Theory and Practice, General Course in Public International Law", Haque Rec., vol. 178, 1982 V, pp. 9-396, p. 178; P. Reuter, Droit international public, Paris, 1983, p. 463; I. Brownlie, International Law and the Use of Force by States, Oxford, 1983, p. 219; Ch. Tomuschat, Repressalie und Retorsion, Zu einigen Aspekten ihrer innerstaatlichen Durchführung, ZaöRV, vol. 33, 1973, pp. 179-222, p. 192; K.J. Skubiszewski, in M. Sørensen, Manual of Public International Law, London, 1968, pp. 753-4; B. Graefrath und P. Steiniger, Kodification der völkerrechtlichen Verantwortlichkeit, Neue Justiz, vol. 27, 1973, pp. 225-28, article 9 (2), p. 228; D. Bowett, "Economic Coercion and Reprisals by States", in Virg. J.I.L., 1972, vol. 13 (I), p. 10.

5/ According to the award in the Naulilaa case, "même si l'on admettait que le droit des gens n'exige pas que la représaille se mesure approximativement à l'offense, on devrait certainement considérer comme excessives et partant illicites, des représailles hors de toute proportion avec l'acte qui les a motivées", UNRIAA, vol. II, p. 1028.

or the extent to which a countermeasure might be disproportionate. While the assessment of the proportionality of a countermeasure must certainly involve consideration of all elements deemed to be relevant in the specific circumstances, the use of expressions such as "manifestly disproportionate" could have the effect of introducing an element of uncertainty and subjectivity in the construction and application of the principle. 6/ A countermeasure which is disproportionate, no matter what the extent, should be prohibited to avoid giving the injured State too much leeway that might lead to abuse.

(5) The Commission has opted for a flexible interpretation of the principle of proportionality. Reference to equivalence or proportionality in the narrow sense by either the reacting State or by the State against which measures are being taken is unusual in State practice. 7/ The task of assessing the proportionality of the countermeasure and the corresponding wrongful act is complicated to some extent by the fact that it requires weighing lawful measures in relation to an unlawful act. A flexible concept of proportionality seems to emerge from the Air Services award, according to which "[i]t is generally agreed that all countermeasures must, in the first instance, have some degree of equivalence with the alleged breach" and "[i]t has been observed, generally, that judging the 'proportionality' of

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In the Air Services award the arbitrators held the United States measures to be in conformity with the principle of proportionality because they "do not appear to be clearly disproportionate when compared to those taken by France" (Case Concerning the Air Services Agreement of 27 March 1946, International Law Reports, vol. 54, 1979, p. 338). The negative formulation also appears in section 905 (1) (b) of the Restatement of the Law Third, according to which an injured State "may resort to countermeasures that might otherwise be unlawful, if such measures ... (b) are not out of proportion to the violation and the injury suffered" (American Law Institute, Restatement of the Law - The Foreign Relations Law of the United States, St. Paul, Minn., 1987, vol. 2, p. 381. According to draft article 9, paragraph 2, proposed by W. Riphagen, "[t]he exercise of [the right to resort to reprisals] by the injured State shall not, in its effects, be manifestly disproportional to the seriousness of the internationally wrongful act committed." Sixth Report on State Responsibility, YBILC, 1985, vol. II (Part One), draft article 9, paragraph 2.

6/ The same holds true for the expressions "hors de toute proportion" used in the Naulilaa award and "clearly disproportionate" in the Air Services award.

7/ G. Arangio-Ruiz, Fourth Report on State Responsibility, document A/CN.4/444/Add.1 at paragraph 54.

countermeasures is not an easy task and can at best be accomplished by approximation". 8/ On the basis of this flexible concept, the arbitrators concluded that "[t]he measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France". 9/

(6) As regards the relevant criteria, considering the need to ensure that the adoption of countermeasures does not lead to any inequitable results, proportionality should be assessed taking into account not only the purely "quantitative" element of damage caused, but also "qualitative" factors such as the importance of the interest protected by the rule infringed and the seriousness of the breach. Therefore, the degree of gravity 10/ and the effects 11/ of the wrongful act should be taken into account in determining the type and the intensity of the countermeasure to be applied. This dual criterion is consistent with the position emerging from the 1934 International Law Institute resolution on reprisals. 12/

8/ International Law Reports, vol. 54, pp. 338 ff.

9/ International Law Reports, vol. 54, pp. 319 ff.

10/ In the award in the Naulilaa case, the notion of proportionality was linked to "l'acte qui ... a motivé[es]" the reprisals, UNRIAA, vol. II, p. 1028. In the doctrine, this position is supported by P. Guggenheim, op. cit., pp. 585-586; H. Kelsen, Principles of International Law, op. cit., p. 21; and S.K. Kapoor, A Textbook of International Law, Allahabad, 1985, p. 625; and Sereni, Diritto Internazionale, vol. III, p. 1559.

11/ Reference to proportionality in relation to the damage suffered is found in, inter alios, J.C. Venezia, "La notion de représaille en droit international public", in RGDIP, vol. 64, 1960, p. 476; A. De Guttry, La rappresaglie non comportanti la coercizione militare nel diritto internazionale, Milano, 1985, p. 263; Elagab, The Legality of Non-Forcible Countermeasures in International Law, Oxford, 1988, p. 94; L. Fisler Damrosch, "Retaliation or arbitration - or both? The 1978 U.S.-France aviation dispute", in AJIL, 1980, p. 796; K. Zemanek, The Unilateral Enforcement of International Obligations, in ZaöRV, vol. 47, 1987, p. 87; and in the reports of two previous Special Rapporteurs, Ago (in YBILC, 1979, vol. II (Part One), para. 82) and Riphagen (in his draft art. 9, para. 2 and comment thereto).

12/ The position of the International Law Institute (ILI) seems to require that the measure be proportional to the gravity of the offence and to the damage suffered. According to the resolution of the ILI, the acting State must "proportionner la contrainte employée à la gravité de l'acte dénoncé comme illicite et à l'importance du dommage subi" (art. 6, para. 2, in Yearbook ILI, vol. 38, 1934, p. 709). See the more recent award in the Air Services case in which the arbitrators held that "it is essential, in a

(7) The rule of proportionality set forth in article 13 requires that a specific countermeasure be proportional first to the degree of gravity of the wrongful act and second, to the effects of that wrongful act on the injured State. The use of the word "degree" in the formulation of the first criterion indicates that the text encompasses wrongful acts of varying degrees of gravity. It would be insufficient, however, to limit the test of proportionality to a simple comparison between the countermeasure and the wrongful act because the effects of a wrongful act on the injured State are not necessarily in proportion to the degree of gravity of the wrongful act.

(8) The requirement that a countermeasure should also be proportional to the effects of the wrongful act on the injured State should not be restrictively interpreted to rule out the taking of countermeasures against a State violating the human rights of its nationals on the ground that such violation did not entail material damage to the injured State. Such an interpretation could have a negative effect on the development and enforcement of human rights law and would not be consistent with the broad concept of injury adopted by the Commission in article 5.

(9) The concluding phrase "on the injured State" is not intended to narrow the scope of the article and unduly restrict a State's ability to take effective countermeasures in respect of certain wrongful acts involving obligations erga omnes, in particular violations of human rights. At the same time, a legally injured State, as compared to a materially injured State, would be more limited in its choice of the type and the intensity of measures that would be proportional to the legal injury it has suffered.

(10) Proportionality is concerned with the relationship between the alleged wrongful act and the countermeasure. It is not to be measured, therefore, on the basis of the aptness of the reaction to attain a particular aim. The purpose of countermeasures, namely to induce the wrongdoing State to comply with its obligations under articles 6 to 10 bis, could be of relevance in deciding whether and to what extent a countermeasure is lawful. This issue, however, is different from that of proportionality and is addressed in article 11.

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dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach" (International Law Reports, vol. 54, 1979, p. 338). See also the proposal made by the previous Special Rapporteur (art. 9, para. 2), op. cit; and the Restatement of the Law Third, op. cit., section 905 (1) (b).

Article 14

Prohibited countermeasures

An injured State shall not resort, by way of countermeasure, to:

(a) the threat or use of force as prohibited by the Charter of the United Nations;

(b) extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed an internationally wrongful act;

(c) any conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents;

(d) any conduct which derogates from basic human rights; or

(e) any other conduct in contravention of a peremptory norm of general international law.

Commentary

(1) As indicated in the introductory phrase of article 14, an injured State is precluded from resorting to certain types of conduct by way of countermeasures. The notion of prohibited countermeasures is the result of the continuing validity of certain general restrictions on the freedom of States notwithstanding the special character of the relationship between the injured State and the wrongdoing State. Subparagraphs (a) to (e) identify the broad areas where non-compliance with applicable norms by way of countermeasures is impermissible and circumscribe the limitations on the measures available to an injured State with respect to each of these areas. Although some of the prohibited countermeasures addressed in subparagraphs (a) to (d) are covered by peremptory norms referred to in subparagraph (e), it was considered preferable to deal with them separately in view of the importance acquired, in particular, in contemporary international society by the prohibition of the use of force and the protection of human rights.

(2) Subparagraph (a) prohibits resort, by way of countermeasures, to the threat or use of force. The trend towards the restriction of resort to armed reprisals, which had already emerged before the Covenant of the League of Nations and the Briand-Kellogg Pact, may be considered to have attained the level of conventional law with the entry into force of these two "anti-war" treaties. Notwithstanding some ambiguities in the relevant rules - particularly in the Covenant - those two treaties may be reasonably

interpreted as restricting, in the first instance, 13/ and forbidding, in the second instance, 14/ resort to "forcible measures short of war" prior to the exhaustion of peaceful means of redress. This construction of the combined effect of the provisions of the two treaties concerning the prohibition of force, on the one hand, and the obligation to attempt a peaceful settlement, on the other, is confirmed by State practice during the period between the two world wars. 15/

13/ Although not explicitly referring to measures short of war, the Covenant specifically condemned resort to war in the following circumstances: (a) prior to the use of one of the peaceful means of dispute settlement envisaged in the Covenant; (b) during the three months following an arbitral award or a judgment of the PCIJ or a report of the League Council (art. 12); (c) against the member State abiding by the arbitral or Court decision (art. 13); (d) against any State abiding by a unanimous report of the Council or a qualified majority report of the Assembly (art. 15). A number of authorities held the view that the prohibition of war in those circumstances included the prohibition of military measures "short of war". See, for example, J. Brierly, "Règles générales du droit de la paix", Haque Rec., 1936-IV, p. 124, and, for a survey of opinions, I. Brownlie, International Law and The Use of Force, Oxford 1963, pp. 220 ff. This position also apparently found some support in the cited opinion of the Committee of Jurists consulted by the League following the Janina (Tellini) case, where the admissibility of forcible measures short of war was made conditional upon a decision of the Council (in the light of arts. 13-15 of the Covenant).

14/ The Briand-Kellogg Pact condemned war in article 1 and in article 2 and prescribed the settlement of disputes by peaceful means (LNTS, vol. 94, 1929, pp. 59-64).

15/ In contrast with the previous period, States resorting to armed measures declared that they were acting in self-defence. See I. Brownlie, International Law and the Use of Force, op. cit., pp. 19 ff.; P. Lamberti Zanardi, La legittima difesa nel diritto internazionale, Milan 1972, pp. 39 ff., and p. 87. Furthermore, the resort to force was also condemned, albeit as "forcible intervention", in the American hemisphere, for example in the "Saavedra Lamas" Treaty of 1933. While article 1 of that Treaty provided "that the settlement of disputes or controversies of any kind that may arise among them shall be effected only by the pacific means which have the sanction of international law", article 3 specified that "in no case shall [the Contracting Parties] resort to intervention, either diplomatic or armed". (United Nations Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928-1948, p. 1039). The Declaration of the Eighth Conference of American States in Lima (1938) is also very clear in reiterating the unlawfulness of all use of force, including armed reprisals. It states "once again" that "All differences of an international character should be settled by peaceful means" and that "the use of force as an instrument of national or international policy is proscribed" (text in AJIL, vol. 34, 1940, Supp., pp. 197-201). On the parallelism of these developments (mutatis mutandis) with the European anti-war trend, see G. Arangio-Ruiz, "The Normative Role of the General Assembly and the Declaration of Friendly Relations, Haque Rec., vol. 137, 1972-III, pp. 547 ff.

(3) At the end of the Second World War, the trend towards restricting the resort to force culminated in the express prohibition of the use of force contained in Article 2, paragraph 4 of the United Nations Charter. The relevance of this prohibition to the use of force by an injured State in the pursuit of its rights is consistent with the intention of the framers of the Charter. 16/ The prohibition of armed reprisals or countermeasures as a consequence of Article 2, paragraph 4 of the Charter is spelled out in the Friendly Relations Declaration, by which the United Nations General Assembly unanimously proclaimed that "States have a duty to refrain from acts of reprisal involving the use of force". 17/ Furthermore, the prohibition of armed reprisals or countermeasures is also implicitly confirmed by the General Assembly resolution concerning the Definition of Aggression, where it is specified that "[n]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression". 18/

16/ The framers of the Charter intended to condemn the use of force even if resorted to in the pursuit of one's rights, as reflected in the proceedings of the San Francisco Conference. See, P. Lamberti Zanardi, La legittima difesa, cit., pp. 143 ff., and R. Taoka, The Right of Self-defence in International Law, (Osaka, 1978), pp. 105 ff.

17/ General Assembly resolution 2625 (XXV) of 24 October 1970, paragraph 6 of the first principle. R. Rosenstock, "The Declaration of Principles of International Law concerning Friendly Relations: A Survey", in AJIL, vol. 65, 1971, pp. 713 ff., p. 726. The International Court of Justice indirectly condemned armed reprisals in asserting the customary nature of the Declaration's provisions condemning the use of force in the Military and Paramilitary Activities in and against Nicaragua case (ICJ Reports, 1986, paras. 188, 190, 191, pp. 89-91). The Helsinki Final Act of 1 August 1975 also contains an explicit condemnation of forcible measures. Part of Principle II of the Declaration of Principles embodied in the first "Basket" of that Final Act reads: "Likewise they [the participating States] will also refrain in their mutual relations from any act of reprisal by force" (Text in L. Sohn, ed., International Organisation and Integration, II, D, 1.a.i, The Hague/Boston/London, 1983, p. 3).

18/ Article 5.1 of the Definition of Aggression (General Assembly resolution 3314 (XXIX) of 14 December 1974). This position is reiterated by the General Assembly in the more recent Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations according to which "[n]o consideration of whatever nature may be invoked to warrant resorting to the threat or use of force in violation of the Charter" (General Assembly resolution 42/22 of 18 November 1987, Annex, Sect. I, No. 3).

Thus, not even a legal consideration, such as the one relating to the pursuit or protection of one's rights, would justify resort to one of the actions referred to in article 3 of the Definition. 19/

(4) That armed reprisals are recognized as prohibited is further evidenced by the fact that States resorting to force attempt to demonstrate the lawfulness of their conduct by characterizing it as an act of self-defence rather than as a reprisal. Since, however, such pleas of self-defence concern reactions to allegedly serious violations of international law involving the use of force (i.e. conduct to be characterized as a crime under article 19 of the present draft), the Commission will refrain from further consideration of this question in this context and will revert to it at a later stage in considering the consequences of international crimes.

(5) The prohibition of armed reprisals or countermeasures as a consequence of article 2, paragraph 4 of the Charter is also consistent with the decidedly prevailing doctrinal view, 20/ although not all of

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19/ Article 3 of the Definition of Aggression lists the forms of aggression, namely: invasion or attack by the armed forces of a State of the territory of another State, bombardment, blockade of the ports or coasts, attack on military forces of another State, the use of armed forces of one State which are in the territory of another State, without the consent of the latter, the action of a State allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State, the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above.

20/ The contemporary doctrine is almost unanimous in characterizing the prohibition of armed reprisals as having acquired the status of a general or customary rule of international law. See I. Brownlie, International Law and the Use of Force by States (Oxford, 1963), pp. 110 ff. and pp. 281-282; P. Reuter, Droit international public (Paris, 1983), pp. 510 ff. and in particular pp. 517-518; A. Cassese, Il diritto internazionale nel mondo contemporaneo (Bologna, 1984), p. 160; H. Thierry, J. Combacau, S. Sur, Ch. Valle'e, Droit international public (Paris, 1986), pp. 192, 493 ff., particularly p. 508; B. Conforti, Diritto internazionale (Napoli, 1987), p. 356; Ch. Dominicé, "Observations sur les droits de l'Etat victime d'un fait internationalement illicite", in Droit international 2 (Paris, 1981-1982), p. 62; F. Lattanzi, Garanzie dei diritti dell'uomo nel diritto internazionale generale (Milan, 1983), pp. 273-279; J.C. Venezia, "La notion de représaille en droit international public", in RGDIP, vol. 64, 1960, pp. 465 ff. p. 494; J. Salmon, "Les circonstances excluant l'illicéité", in Responsabilité internationale, Paris, 1987-1988, p. 186; W. Riphagen, Fourth Report on State Responsibility, YBILC, vol. II, (Part One) 1983, p. 15, para. 81. The minority who doubt the customary nature of the prohibition are equally firm in

them, 21/ as well as a number of authoritative pronouncements of

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recognizing the presence of a unanimous condemnation of armed reprisals in Article 2 (4) of the Charter as reaffirmed in the Friendly Relations Declaration. See, for example, J. Kunz, "Sanctions in International Law", in AJIL, vol. 54, 1960, pp. 325 ff; G. Morelli, Nozioni di diritto internazionale, Padova, 1967, pp. 352 and 361 ff.; G. Arangio-Ruiz, "The Normative Role for the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations", in Haque Rec., vol. 137, 1972-III, p. 536. It is also significant that the majority of the recent monographic studies on reprisals are expressly confined to measures not involving the use of force. See, in particular, A. De Guttry, La rappresaglie non comportanti la coercizione militare nel diritto internazionale, Milano, 1985; E. Zoller, Peacetime Unilateral Remedies: An Analysis of Countermeasures, Dobbs Ferry, New York, 1984; and O.Y. Elagab, The Legality of Non-Forcible Countermeasures in International Law, Oxford, 1988. These authors obviously assume that "the prohibition to resort to reprisals involving armed force had acquired the rank status of a rule of general international law" (A. De Guttry, op. cit., p. 11). See also the Third Restatement of the Law of Foreign Relations of the United States, Section 905 of which states that "[t]he threat or use of force in response to a violation of international law is subject to prohibitions on the threat or use of force in the United Nations Charter, as well to Subsection (1)". The subsection in question specifies that "a State victim of a violation of an international obligation by another State may resort to countermeasures that might otherwise be unlawful, if such measures (a) are necessary to terminate the violation or prevent further violation, or to remedy the violation; and (b) are not out of proportion to the violation and the injury suffered" (American Law Institute, Restatement of the Law Third: The Foreign Relations Law of the United States, St. Paul, Minn. 1987, vol. 2, p. 380).

21/ The dissenting authors are of the view that some forms of unilateral resort to force either have survived the sweeping prohibition of Article 2, paragraph 4, to the extent that they are not used against the territorial integrity or political independence of any State or contrary to the purposes of the United Nations but rather to restore an injured State's rights, or have become a justifiable reaction under the concepts of armed reprisals or self-defence based on the realities of persistent State practice and the failure of the collective security system established by the Charter to function as envisaged in practice. E.S. Colbert, Retaliation in International Law, New York, 1948; J. Stone, Aggression and World Order. A Critic of United Nations Theories of Aggression, London, 1958, especially pp. 92 ff.; R.A. Falk, "The Beirut Raid and International Law of Retaliation", AJIL, vol. 63, 1969, pp. 415-443; D.W. Bowett, "Reprisals Involving Recourse to Armed Force", in AJIL, vol. 66, 1972, pp. 1-36; R.W. Tucker, "Reprisals and Self-Defence: The Customary Law", AJIL, vol. 66, 1972, pp. 586-596; R. Lillich, "Forcible Self-Help under International Law", in 62 United States War College - International Studies (1980), Readings in International Law from the Naval War College Review 1947-1977 (R. Lillich and Moore, eds.), vol. II: The Use of Force, Human Rights and General International Legal Issues; D. Levenfeld, "Israeli Counter Fedayeen Tactics in Lebanon: Self-Defense and Reprisal under Modern International Law", Columbia Journal of Transnational

international judicial 22/ and political bodies. 23/ This prohibition has acquired the status of a general or customary rule of international law according to the prevailing view in the literature which is consistent with international jurisprudence.

(6) The prohibition of the threat or use of force by way of countermeasures is set forth in subparagraph (a). This prohibition is defined in terms of a general reference to the Charter. The Commission was of the view that a specific reference to Article 2, paragraph 4 would not accurately reflect the scope of the prohibition of the threat or use of force since the Charter permits the use of force as authorized by the United Nations as well as in the exercise of the right of individual or collective self-defence. While those exceptions would only come into play in relation to delinquencies qualified as crimes under article 19 of Part One of the draft and might therefore not be relevant in the present context, it was generally agreed that merely referring to Article 2, paragraph 4 of the Charter would incorrectly reflect the content of the Charter prohibition of the threat or use of force. Furthermore, the Commission opted for a general reference to the Charter as one source, but not the exclusive source, of the prohibition in question which is also part of general international law and has been characterized by the International Court of Justice as a norm of customary international law.

(7) Subparagraph (b) restricts the extent to which an injured State may resort to economic or political coercion by way of countermeasures. A great variety of forms of economic or political measures are frequently resorted to and are considered admissible as countermeasures against internationally

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Law, vol. 21, 1982, p. 148; Y. Dinstein, War, Aggression and Self-Defence, Cambridge, 1988, pp. 202 ff. For a critical review of the literature, see R. Barsotti, "Armed Reprisals", in A. Cassese, ed., The Current Legal Regulation of the Use of Force, Dordrecht, Boston, Lancaster, 1986, pp. 81 ff.

22/ The condemnation of armed reprisals and the consolidation of the prohibition into a general rule are supported by the statement of the International Court of Justice in the Corfu Channel case with respect to the recovering of the mines from the Corfu Channel by the British navy ("Operation Retail") (ICJ Reports 1949, p. 35, see also YBILC, 1979, vol. II (Part One), para. 89) and, more recently, by the decision of the Court in the Military and Paramilitary Activities in and against Nicaragua case (ICJ Reports 1986, paras. 248-249, p. 127).

23/ See, for example, Security Council resolution 3538 (1956), resolution 5111 (1962) and resolution 188 (1964).

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wrongful acts. 24/ Their admissibility, however, is not totally exempt from restriction since extreme economic or political measures may have consequences as serious as those arising from the use of armed force.

(8) There are divergent views in the literature concerning the possible relevance of the condemnation of the use of force, under Article 2, paragraph 4 of the Charter or general international law, in determining the lawfulness of economic or political coercion as a form of countermeasure. According to the most widely accepted interpretation, the prohibition of the use of force is limited to military force and, therefore, objectionable forms of economic or political coercion could only be condemned under a distinct rule prohibiting intervention or particular forms thereof. 25/ Noting the absence of any other Charter provision condemning individual coercive

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24/ The admissibility of economic countermeasures is recognized by the Commission in the commentary to article 30 of the first part of the present draft in stating "that modern international law does not normally place any obstacles of principle in the way of the application of certain forms of reaction to an internationally wrongful act" (economic reprisals, for example). (YBILC, 1979, vol. II (Part Two), p. 116, para. 5.)

25/ According to this interpretation, the prohibition contained in Article 2, paragraph 4 should be logically understood to "embrace also measures of economic or political pressure applied either to such extent and with such intensity as to be an equivalent of an armed aggression or, in any case - failing such an extreme - in order to force the will of the victim State and secure undue advantages" for the acting State. G. Arangio-Ruiz, "Human Rights and Non-Intervention in the Helsinki Final Act", in Haque Rec., vol. 157, 1977-IV, p. 267. A similar position is taken by A. Cassese, Diritto internazionale, op. cit., p. 163. Cfr. H. Waldock, "The Regulation of the use of Force by Individual States in International Law", Haque Rec., vol. 81, 1952-II, pp. 493-4; L. Oppenheim, International Law, vol. II, London, 1952, p. 153; D.W. Bowett, "Economic Coercion and Reprisals by States", Virg. JIL, vol. 13, 1972, p. 1; R. Lillich, "The Status of Economic Coercion Under International Law: United Nations Norms", in R. Mersky ed., Conference on Transnational Economic Boycotts and Coercion, 19-20 February 1976, University of Texas Law School, vol. I, pp. 116-17; A. Beirlaen, "Economic Coercion and Justifying Circumstances", RBDI, vol. 18, 1984-5, p. 67; M. Virally, "Commentaire de l'article 2 par. 4 de la Charte", in J.P. Cot, A. Pellet, eds., La Charte des Nations Unies, Paris, Bruxelles, 1985, pp. 120-21; C. Leben, "Les contre-mesures inter-étatiques et les réactions à l'illicite dans la société internationale", in AFDI, vol. 28, 1982, pp. 63-69; P. Malanczuk, "Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the ILC's Draft Articles on State Responsibility", in ZaöRV, vol. 43, 1983, p. 737; O.Y. Elagab, op. cit., p. 201; I. Seidl-Hohenveldern, "International Economic Law", Haque Rec., vol. 198, 1986-III, pp. 200-1, Restatement of Law Third, op. cit., p. 383; L.A. Sicilianos, op. cit., pp. 248-253.

measures, some authors maintain that Article 2, paragraph 4 applies not only to armed reprisals but also to economic coercion measures. 26/ In their view, such measures do not differ in aim or result from the resort to armed force when the consequences of those measures are in effect the economic "strangulation" of the target State.

(9) The consideration of relevant State practice is particularly important in light of the divergent doctrinal views. During the San Francisco Conference the Latin American States put forward a proposal to extend the condemnation contained in Article 2, paragraph 4 of the Charter to the use of economic or political force. 27/ The defeat of this proposal may have been due to the broad definition of economic or political force rather than categorical opposition to any prohibition of actions of this nature. More recently, there were unsuccessful attempts to link a condemnation of economic or political coercion to the prohibition of the threat or use of force in the context of both the Friendly Relations Declaration and the resolution on the Definition of Aggression. 28/

26/ See, in particular, J. Zourek, "La Charte des Nations Unies interdit-elle le recours à la force en général ou seulement à la force armée?", in Mélanges Rolin, Paris, 1964, pp. 530 ff.; and M. Obradovic, "Prohibition of the Threat or Use of Force", in M. Sahovic, ed., Principles of International Law Concerning Friendly Relations and Cooperation, Belgrade, New York, 1972, pp. 76 ff. Following the Arab oil embargo of 1973, this position was also supported by some Western authors. In this regard, see J.J. Paust, A.P. Blaustein, "The Arab Oil Weapon - A Threat to International Peace", in AJIL, vol. 68, 1974, pp. 420 ff.

27/ See Documents of the United Nations Conference on International Organization, San Francisco, 1945, London-New York, 1945, vol. 6, p. 559 for the text of the amendment proposed by Brazil, and pp. 334, 339-340 for the discussion in the Committee I/1 on 5 June 1945.

28/ General Assembly resolution 3314 (XXIX) (1974). Some countries attempted to achieve this link during the lengthy negotiations concerning the definition of aggression. See the proposal put forward by Bolivia according to which "unilateral action whereby a State is deprived of its economic resources derived from the proper conduct of international trade or its basic economy is endangered so that its security is affected and it is unable to act in its own defence or to cooperate in the collective defence of peace" should have been considered a form of aggression (document A/AC.66/L.9 (1953)). Here again the Western States opposed an express provision on economic coercion mainly due to the extremely flexible formulation proposed. Statement by Fitzmaurice, in GAOR, seventh session, annexes, agenda item 54, p. 74. See also the more recent statement of El Salvador expressing dissatisfaction with the proposed definition of aggression for its failure to include indirect

(10) Although State practice does not appear to warrant the conclusion that certain forms of economic or political coercion are equivalent to forms of armed aggression, this practice reveals a separate and distinct trend restricting the extent to which States may resort to economic or political measures. 29/ The General Assembly clearly condemns not only armed intervention but also "all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements" in its Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty. 30/ The Declaration further provides that "No State may use or encourage the use of economic, political or any type of measures to coerce another State to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind". Similarly, the Friendly Relations Declaration proclaims that "[n]o State may use or encourage the use of economical, political or any other type of measure to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind". 31/

(11) State practice at the regional level also provides support for the prohibition of extreme economic or political coercion. The 1948 Bogota

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economic aggression. Official Records of the General Assembly, Twenty-ninth Session, Plenary Meetings, vol. I, 2239th meeting, para. 157. The Special Committee on the definition declared that a provision in that sense would have been an obstacle to the adoption of the resolution by consensus.

29/ See G. Arangio-Ruiz, "Human Rights and Non-Intervention in the Helsinki Final Act", in Haque Rec., vol. 157, 1977-IV, p. 267; D.W. Bowett, op. cit., in Virg. JIL, vol. 13, 1972, pp. 2-3; Y. Blum, "Economic Boycotts in International Law", in Conference on Transnational Economic Boycotts, op. cit., p. 96; P. Malanczuk, op. cit., p. 737; A. Bierlaen, op. cit., p. 67; I. Seidl-Hohenveldern, "The United Nations Economic Coercion", in RBDI, vol. 18, 1984-5, p. 11; and J. Salmon, op. cit., p. 186. See also, L. Boisson de Chazournes, Les contre-mesures dans les relations internationales économiques, Thèse présentée à l'Université de Genève, 1990, Chapter III, Part A, Section 3, para. 3.2, pp. 149-151.

30/ General Assembly resolution 2131 (XX) of 21 December 1965 adopted by a vote of 109 in favour and 1 abstention, the relevant provisions of which were later incorporated in the Friendly Relations Declaration.

31/ General Assembly resolution 2625 (XXV) of 24 October 1970.

Charter establishing the Organization of American States contains a broad formulation of the principle of non-intervention 32/ and expressly prohibits "the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind." 33/ A similar prohibition is contained in another significant, although non-binding, regional instrument, the Helsinki Final Act of 1975, under the specific title of non-intervention. 34/

(12) All of these international and regional instruments condemn resort to economic or political coercion when it infringes the principle of non-intervention. Thus, there appear to be different regimes prohibiting the use of force, on the one hand, and the use of extreme economic or political coercion, on the other, by way of countermeasures. 35/ In contrast with the general prohibition of armed countermeasures in any circumstances, the prohibition against economic or political coercion is limited to those measures that are aimed at unacceptable ends such as the subordination of the exercise of the sovereign rights of the target State or securing advantages of any kind. Therefore, the condemnation of coercive measures, other than those

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32/ According to the principle of non-intervention set forth in article 15, there is no "right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State." It is further stated that this principle "prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements." For a bibliography on the principle of non-intervention in the Americas, see Ch. Rousseau, Droit international public, vol. IV, Paris, 1980, pp. 53 ff.

33/ Article 16 (UNTS, vol. 119, p. 3).

34/ According to principle VI, all States will "in all circumstances refrain from any other act of military, or political, economic or other coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantages of any kind". See G. Arangio-Ruiz, Human Rights and Non-Intervention, cit., pp. 274 ff.

35/ This is consistent with the jurisprudence of the International Court of Justice which recognized the unlawfulness of economic measures in the context of the principle of non-intervention in the case concerning Military and Paramilitary Activities in and against Nicaragua (I.C.J. Reports, 1986, pp. 108 ff., para. 126).

involving the threat of use of force, only extends to measures of an economic or political nature which are likely to result in very serious if not disastrous consequences for the State concerned. 36/

(13) That the seriousness of the potential consequences of the non-forcible coercive measures should be taken into account in determining their prohibited character is confirmed by other elements of State practice. In the numerous cases in which economic measures have been resorted to, the complaints of the targeted States have been based not so much on the nature of the act per se but rather on the resulting "economic strangulation" or other catastrophic effects. This was the position taken by Bolivia with regard to the sea dumping of tin by the Soviet Union in 1958 37/ and by Cuba with regard to the drastic reduction of United States sugar imports in 1960, 38/ cases which did not however involve countermeasures in a strict sense. 39/ Some Latin American countries, including Argentina, 40/ alleged before the Security Council that the trade sanctions resorted to by Western countries

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36/ These consequences are not necessarily different from those that may occur as a result of the unlawful use of force. This has led some authors to question the distinction between the two prohibitions in a meaningful and practical sense. For a discussion of this question in relation to the Friendly Relations Declaration, see G. Arangio-Ruiz, The Normative Role of the General Assembly, op. cit., pp. 528-530.

37/ See McDougal-Feliciano, Law and Minimum World Public Order - The Legal Regulation of International Coercion, New Haven and London, 1961, p. 194, note 165.

38/ Cuba qualified this action as a "constant aggression for political purposes against the fundamental interests of the Cuban economy". AJIL, vol. 55, 1961, pp. 822 ff.

39/ It is not clear whether the State adopting the measure was reacting against a prior unlawful act. However, even if a prior unlawful act was missing, the statements referred to appear to be relevant, because they highlight the conditions under which the use of economic force is considered unlawful. One must bear in mind that in economic matters the line between retortion and reprisal is not always clear since the rights and duties are usually conventional and their interpretation is often debated.

40/ According to Argentina, the measures adopted by the EEC would amount to an economic aggression openly violating the principles of international law and the law of the United Nations. See A. De Guttry, Le contromisure adottate nei confronti dall'Argentina da parte della Comunità europee a dei terzi Stati ed il problema della loro liceità internazionale, in N. Ronzitti (ed.), La questione delle Falkland-Malvinas nel diritto internazionale, Milan, 1984, p. 357.

following the outbreak of the Falkland/Malvinas crisis qualified as acts of "economic aggression carried out in blatant violation of international law". 41/ The Soviet Union accused the United States of "using trade as a weapon against our country" with regard to the measures adopted following the Polish crisis in 1981-1982. 42/ In this case the United States, which traditionally opposes a broad interpretation of Article 2, paragraph 4, maintained that it was not seeking "to bring the Soviet Union to its knees economically" 43/ and further declared during the debates in the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations that the pressure exercised by the Soviet Union on Poland, which led to the declaration of martial law in the latter country, was tantamount to an unlawful resort to force. 44/ Some States have also characterized the measures adopted by South Africa towards neighbouring countries purportedly for giving shelter to African National Congress members as unlawful economic coercion used to influence another country's conduct. 45/

(14) The prohibition of economic or political coercion by way of countermeasures contained in subparagraph (b) is based on the extreme nature of the measures as determined by the seriousness of their potential consequences in terms of endangering "the territorial integrity or political independence" of the State concerned. By incorporating this phrase taken from Article 2, paragraph 4, of the Charter, the Commission recognizes that forcible and non-forcible measures may have equally serious effects, while avoiding the controversial question of whether that provision of the Charter

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41/ Statement by Venezuela, in S/PV.2362, 22 May 1982, pp. 23-25; see also the statements by El Salvador, in S/PV.2363, 23 May 1982, p. 47; Nicaragua, ibid.; Ecuador, in S/PV.2360, 21 May 1982, p. 71.

42/ Statement of the USSR Minister of Foreign Trade, in Financial Times, 17 November 1982, p. 1.

43/ Statement by Thomas N.T. Niles, Deputy Assistant Secretary, in Hearing before the Subcommittee on Europe and the Middle East of the Committee on Foreign Affairs, House of Representatives, 97th Congress, Second session, 10 August 1982, Washington, 1982, p. 8.

44/ Document A/37/41, para. 50.

45/ See the statements of Yugoslavia, Madagascar and Thailand, in S/PV.2660, 12 February 1986, pp. 13 ff., 28 ff., 38 ff.

should be interpreted as referring only to the use of armed force or as encompassing other forms of unlawful coercion. The Commission is aware that if formulated too broadly, subparagraph (b) might amount to a quasi-prohibition of countermeasures. It has therefore narrowed the scope of the text first by limiting prohibited conduct to "extreme economic or political coercion" and second by using the term "designed" which connotes a hostile or punitive intent and excludes conduct capable of remotely and unintentionally endangering the territorial integrity or political independence of the State.

(15) Subparagraph (c) limits the extent to which an injured State may resort, by way of countermeasures, to conduct that is contrary to diplomatic or consular law. While an injured State may resort to countermeasures affecting its diplomatic relations with the wrongdoing State, including declarations of persona non grata, the termination or suspension of diplomatic relations and the recalling of ambassadors, not all forms of countermeasures relating to diplomatic law or affecting diplomatic relations are considered unlawful.

(16) The sphere of prohibited countermeasures extends to those rules of diplomatic law which are designed to guarantee the physical safety and inviolability of diplomatic agents, premises, archives and documents in all circumstances, including armed conflict. 46/ This minimum guarantee of protection is essential to the communication and interaction between States in times of crisis as well as under normal conditions. In situations involving an unlawful act, which are by definition conflictual in nature, it is particularly important to preserve the channels of diplomacy, on the one hand, and to protect highly vulnerable persons and premises from countermeasures, on the other.

(17) While the State practice concerning the restrictions on the ability of an injured State to derogate by way of countermeasures from obligations affecting

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46/ See, for example, articles 22, 24, 29, 44 and 45, Vienna Convention on Diplomatic Relations (UNTS, vol. 500, p. 95). De Guttry is of the view that the unlawfulness of reprisals against diplomatic envoys covers essentially measures directed against the physical persons of diplomats, such measures consisting essentially but not exclusively, in a breach of the rule of personal inviolability. In his view, the raison d'être of the restriction is the necessity to safeguard, in any circumstances, the special protection which is reserved to diplomatic envoys in view of the particular tasks they perform (op. cit., pp. 282-283).

the treatment of diplomatic envoys is relatively scarce, 47/ there is widespread support in the doctrine for the prohibition of reprisals or countermeasures against persons enjoying protection as a matter of diplomatic law. 48/ While some authors believe that this prohibition is derived from the primary rules concerning the protection of diplomatic envoys which they characterize as peremptory norms, 49/ others find its basis in the

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47/ For example, in 1966 Ghana arrested the members of the delegation of Guinea to the OAU Conference, including the Foreign Minister. The arrest, which took place on board an aircraft of an American airline in transit at Accra, was justified by the Government of Ghana as a means to secure reparation for a number of wrongful acts committed by Guinea, including a raid on the premises of the Ghanaian Embassy at Conakry and the arrest of the Ambassador with his wife (Keesing's, op. cit., pp. 21738-40). Another example is the arrest by Ivory Coast authorities, in 1967, of the Foreign Minister during a forced interruption of their flight to Guinea. The Ivory Coast Foreign Minister stated that "This arrest ... is a consequence of the arbitrary detention of several Ivory Coast nationals in the Republic of Guinea, and the Ivory Coast keenly regrets being obliged ... to detain the group of Guineans on Ivory Coast soil until the release of Ivory Coast nationals". SCOR, 22nd year, Supp. for July-August and September 1967, annex IV, p. 176.

48/ For example, Oppenheim states that "Individuals enjoying the privilege of extraterritoriality while abroad such as heads of States and diplomatic envoys, may not be made the object of reprisals, although this has occasionally been done in practice". L. Oppenheim, International law, vol. II, 7th edition, op. cit., p. 140. This opinion was expressed by Hugo Grotius, De Jure Belli Ac Pacis Libri II, The Classics of International Law, J.B. Scott ed., Washington, 1925, chap. 18, S.iii, S.viii. According to Twiss, diplomatic agents "cannot be the subjects of reprisals, either in their persons or in their property, on the part of the Nation which has received them in character of envoys (legati), for they have entrusted themselves and their property in good faith to its protection (T. Twiss, The Law of Nations considered as Independent Political Communities, London and Oxford, 1963, p. 39). See also Ph. Cahier, Le droit diplomatique contemporain, Genève, 1962, p. 22; Ch. Tomuschat, "Zu einige Aspekten ihrer innerstaatlichen Durchfürung", ZaöRV, vol. 33, 1973, pp. 179 ff, p. 187; and Ch. Dominicé, "Représailles et droit diplomatique", in Recht als Prozess und Gefüge. Festschrift für Hans Huber zum 80 Geburtstag, Bern, 1981, p. 547.

49/ Discussing the ICJ judgment in the Case concerning United States Diplomatic and Consular staff in Tehran (United States v. Iran) (I.C.J. Reports, 1980, p. 3) proper criteria, Rölling stated that "it would have been a good thing if the Court had had or taken the opportunity to make a clear statement that those involved were persons against whom reprisals are forbidden in all circumstances, according to unwritten and written law even if the wrong against which a State wished to react consisted of the seizure of its diplomats! The provisions of the Convention are so formulated that 'reprisals in kind' are also inadmissible. It is possible to dispute the

particular nature of diplomatic law as a "self-contained" regime, 50/ as recognized by the International Court of Justice in the Hostages case. 51/ A few authors, however, question the existence of a rule of general international law condemning otherwise not unlawful acts of coercion directed against diplomatic envoys. 52/

(18) The rules of diplomatic law which are beyond the realm of countermeasures available to an injured State are addressed in subparagraph (c). The prohibition on resort to certain conduct by way of countermeasures is defined in terms of the inviolability of protected persons, premises and property. It extends to consular agents, premises, archives and documents - which are also prime targets in situations of inter-State tension - to the extent that such persons, premises and property enjoy inviolability under the legal regime

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wisdom of this legal situation, but the arguments in favour of the current law - total immunity of diplomats because of the great importance attached to unhindered international communication - prevail". (B.V.A. Röling, "Aspects of the Case concerning U.S. Diplomats and Consular Staff in Teheran", in Neth. YBIL 1980, p. 147.) The same opinion is held by Dominicé who wonders, "Que deviendraient les relations diplomatiques, en effet, si l'Etat qui, fût-ce à juste titre, prétend être victime d'un fait illicite, pouvait séquester un agent diplomatique ou pénétrer dans les locaux d'une mission en s'appuyant sur la doctrine des représailles?" (Ch. Dominicé, "Observations ...", op. cit., p. 63.) L.A. Sicilianos, op. cit., p. 351, states that "il y a certainement un noyau irréductible du droit diplomatique ayant un caractère impératif - l'inviolabilité de la personne des agents diplomatiques, l'inviolabilité des locaux et des archives - qui est de ce fait réfractaire aux contremesures. Il y a en revanche d'autres obligations qui ne semblent pas s'imposer forcément en toute hypothèse et qui pourraient, certes avec toute la précaution voulue, faire l'objet de contremesures proportionnées".

50/ F. Lattanzi, Garanzie ..., op. cit., pp. 317-318; O.Y. Elagab, op. cit., pp. 116 ff.

51/ In this regard, the Court expressed the following view: "[t]he rules of diplomatic law, in short, constitute a self-contained régime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the missions and specifies the means at the disposal of the receiving State to counter any such abuse". I.C.J. Reports, 1980, p. 3 at p. 40, para. 86.

52/ See D. Anzilotti, Corso di diritto internazionale pubblico, vol. III, Rome 1915, p. 167, and, more recently, B. Conforti, Diritto internazionale, Naples 1987, pp. 360-361.

governing consular relations. 53/ Thus, subparagraph (c) is without prejudice to the primary norms or the separate treaty regimes that govern diplomatic and consular relations.

(19) An explicit reference to multilateral diplomacy was considered to be unnecessary since representatives to international organizations are covered by the reference to diplomatic agents. As for officials of international organizations, no retaliatory step taken by a host State to their detriment could ever qualify as a countermeasure since it would involve non-compliance - not with an obligation owed to the wrongdoing State - but with an obligation owed to a third party, namely the international organization concerned.

(20) Subparagraph (d) prohibits the resort, by way of countermeasures, to conduct derogating from basic human rights. This prohibition, which is dictated by fundamental humanitarian considerations, initially developed in the context of the law of war since such considerations were most frequently sacrificed as a result of the exceptional circumstances existing in time of war. 54/ As early as 1880, the Institute of International Law attempted to regulate reprisals in its Manual of the Laws of War on Land which provided that such measures "must conform in all cases to the laws of humanity and morality". 55/ The human suffering caused by reprisals during the First World War led to the adoption of a rule prohibiting reprisals against prisoners of war in the Geneva Convention of 1929. 56/ Since the

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53/ See, for example, articles 31, 33 and 41 of the Vienna Convention on Consular Relations, UNTS, vol. 596, p. 261.

54/ The development of humanitarian limitations to the right of adopting reprisals is thoroughly illustrated by F. Lattanzi, Garanzie ..., op. cit., pp. 295-302.

55/ See resolutions of the Institute of International Law, Oxford Session of 1880, The Laws of War on Land, articles 85 and 86.

56/ Article 2 of the Convention relative to the Treatment of Prisoners of War, Geneva, 27 July 1929, LNTS, vol. 118, pp. 343-411. There is no similar provision in the 1929 Convention concerning the wounded and sick. However, it has been suggested that this omission was due to an oversight and that, in any event, the Convention implicitly prohibits reprisals by requiring respect for the Convention "in all circumstances" under article 25. "The fact that this prohibition was not also inserted in 1929 in the Convention dealing with the wounded and sick - not explicitly, that is to say, for it follows by implication from the principle of the respect to which they are entitled - can only have been due to an oversight. The public conscience having disavowed reprisals against prisoners of war, that disavowal is a fortiori applicable to

Second World War, reprisals against protected persons or property have also been unanimously prohibited by the Geneva Conventions of 1949 57/ as well as the Additional Protocol I thereto of 1977. 58/ Furthermore, the absolute character of this prohibition is indicated in the Vienna Convention on the Law of Treaties which expressly provides that the termination or suspension of a treaty in response to a material violation shall not be resorted to with regard "to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties". 59/

(21) In addition to the prohibition of belligerent reprisals, the development of international humanitarian law is also significant in its recognition of the existence of imprescriptible and inviolable rights conferred on

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reprisals against military personnel who, like the wounded and sick, are defenceless and entitled to protection." J. Pictet, Commentary to Geneva Convention I for the amelioration of the condition of the wounded and sick in armed forces in the field, Geneva 1952, p. 344.

57/ Article 46 of Geneva Convention I for the amelioration of the condition of the wounded and sick in armed forces in the field, UNTS, vol. 75, p. 31; article 47 of Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked members of Armed Forces at Sea, UNTS, vol. 75, p. 85; article 13, para. 3, of Geneva Convention III relative to the Treatment of Prisoners of War, UNTS, vol. 75, p. 135; article 33, para. 3, of Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, UNTS, vol. 75, p. 287.

58/ Article 20 of Additional Protocol I of 8 June 1977 to the Geneva Conventions of 12 August 1949, ILM, vol. 16, 1977, p. 1391.

59/ Article 60, paragraph 5 (UNTS, vol. 1155, p. 331). The doctrine indicates that this limitation applies to the various instruments relating to humanitarian law as well as human rights law. On the inapplicability of the principle of reciprocity in case of violations of human rights treaty obligations, see F. Lattanzi, Garanzie ..., op. cit., pp. 302 ff.; L.S. Sicilianos, op. cit., pp. 352-358. Schachter is of the opinion that the "treaties covered by this paragraph clearly include the Geneva Conventions for the protection of victims of war, the various human rights treaties, and conventions on the status of refugees, genocide and slavery" (O. Schachter, "International Law in Theory and Practice. General Course in Public International Law", Haque Rec., vol. 178, 1982-V, p. 181). The inviolability of these rules by way of reprisal is also maintained by K. Zemanek, "Responsibility of States: General Principles", in Enc. of Publ. Int. Law, vol. 10, 1987, p. 371.

individuals by international law. 60/ The requirement of humane treatment based on the principle of respect for the human personality 61/ extends to internal armed conflicts by virtue of common article 3 of the 1949 Geneva Conventions as well as Additional Protocol II thereto of 1977. 62/ According to the commentary to the first Geneva Convention, this common provision "makes it absolutely clear that the object of the Convention is a purely humanitarian one ... and merely ensures respect for the few essential rules of humanity which all civilized nations consider as valid everywhere and under all circumstances and as being above and outside war itself." 63/ Thus, common article 3 prohibits any reprisals in non-international armed conflicts with respect to the expressly prohibited acts 64/ as well as any

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60/ See J. Pictet, Commentary to Geneva Convention I, op. cit., commentary to article 7, p. 82, which states as follows:

> "In the development of international law the Geneva Convention occupies a prominent place. For the first time, with the exception of the provisions of the Congress of Vienna dealing with the slave-trade, which were themselves still strongly coloured by political aspirations, a set of international regulations was devoted, no longer to State interests, but solely to the protection of the individual. The initiators of the 1864 and following Conventions wished to safeguard the dignity of the human person, in the profound conviction that imprescriptible and inviolable rights were attached to it even when hostilities were at their height (citations omitted)."

61/ "The principle of respect for human personality, which is at the root of all the Geneva Conventions, was not a product of the Conventions. It is older than they are and independent of them." (J. Pictet, Commentary to Geneva Convention I, op. cit., p. 39.)

62/ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), ILM, vol. 16, 1977, p. 1442.

63/ J. Pictet, Commentary to Geneva Convention I, op. cit., p. 60.

64/ The first paragraph of common article 3 provides as follows:

> "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all

other reprisal incompatible with the absolute requirement of humane treatment. 65/ The requirement of humane treatment in non-international armed conflicts applies to all protected persons without discrimination, including foreign nationals notwithstanding the absence of a specific reference to nationality in the non-discrimination clause contained in paragraph 1 of common article 3. 66/

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circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

65/ See, for example, J. Pictet, Commentary to Geneva Convention I, op. cit., p. 55, which states as follows:

"Reprisals ... do not appear here in the list of prohibited acts. Does that mean that reprisals, while formally prohibited under article 46, are allowed in the case of non-international conflicts, that being the only case dealt with in article 3? As we have seen, the acts referred to under items (a) to (d) are prohibited absolutely and permanently, no exception or excuse being tolerated. Consequently, any reprisal which entails one of these acts is prohibited, and so, speaking generally, is any reprisal incompatible with the 'humane treatment' demanded unconditionally in the first clause of subparagraph (1)."

66/ See J. Pictet, Commentary to Geneva Convention I, op. cit., p. 56, stating as follows:

"To treat aliens in a civil war in a manner incompatible with humanitarian requirements, or to believe that one was justified in letting them die of hunger or in torturing them, on the grounds that the criterion of nationality had been omitted, would be the very negation of the spirit of the Geneva Conventions."

(22) The recognition of essential rules of humanity and inviolable rights which led to the prohibition of reprisals in time of international or internal armed conflict led to similar restrictions on reprisals in time of peace. 67/ The general character of the humanitarian limitation on reprisals was recognized in the award in the Naulilaa case which stated that a lawful reprisal must be "limited by the requirements of humanity and the rules of good faith applicable in relations between States". 68/ Similarly, the International Law Association in its 1934 resolution stated that in the exercise of reprisals a State must "s'abstenir de toute mesure de rigueur qui serait contraire aux lois de l'humanité et aux exigences de la conscience publique". 69/ More specifically, the League of Nations Assembly's debates on the implementation of article 16 of the Covenant emphasized that the economic measures to be applied in case of aggression should not endanger humanitarian relations. 70/

(23) The inhumane consequences of a reprisal may be the direct result of measures taken by a State against foreign nationals 71/ within its territory or the indirect result of measures aimed at the wrongdoing State. The following cases may be considered as examples of humanitarian limitations on measures with direct consequences for foreign nationals in the territory of the acting State. As early as 1888, following the violation by the

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67/ See F. Lattanzi, Garanzie ..., op. cit., pp. 293-302; similarly A. De Guttry, op. cit., pp. 268-271. After explaining that resort to one or the other of the possible coercive measures depends on the choice of States, Anzilotti noted that States are not absolutely free in their choice. He listed a number of actions condemned by the laws of warfare, although constituting a minus as compared to warfare itself, and concluded that these actions were to be condemned a fortiori in peacetime (Corso di diritto internazionale pubblico, vol. III, Rome, 1915, pp. 166-67).

68/ UNRIAA, vol. II, p. 1026.

69/ Article 6, paragraph 4, Ann. IDI, vol. 38, 1934, p. 709.

70/ League of Nations, Reports and Resolutions on the Subject of Article 16 of the Covenant, 13 June 1927, pp. 11 ff.

71/ In this regard, the comment to article 905 of the Third Restatement of the Law of Foreign Relations expresses the view that "Self-help measures against the offending State may not include measures against the State's nationals that are contrary to the principles governing human rights and the treatment of foreign nationals" (Restatement, op. cit., p. 381).

United States of the 1880 Treaty on the establishment of Chinese nationals (the "Chinese Exclusion Act"), China, while suspending performance of its treaty obligations towards the United States, decided nevertheless to respect, for reasons of humanity, the rights of United States nationals under Chinese jurisdiction. 72/ More recently, during the Falkland-Malvinas crisis, the United Kingdom froze Argentinean assets in the country, but with the specific exception of the funds which would normally be necessary for "living, medical, educational and similar expenses of residents of the Argentine Republic in the United Kingdom" and for "payments to meet travel expenditures by residents of the Argentine Republic leaving the United Kingdom". 73/

(24) With regard to humanitarian limitations on measures with indirect consequences on the nationals of the target State, mention may be made of the following examples. After the killing of 85 young people on 15 May 1979, at Bangui, by the personal security forces of Bokassa, ruler of the Central African Republic, France, in retaliation, suspended a financial cooperation agreement 74/ with that country, but excluded from the measure financial assistance in the fields of education, food and medicine. 75/ In declaring, in 1986, a total blockade of trade relations with Libya by way of countermeasures, the United States prohibited the export "to Libya of any goods, technology (including technical data or other information) or services from the United States except publications and donations of articles intended

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72/ Foreign Relations Law of the United States 1889, p. 132.

73/ Notice of the Bank of England issued on 3 April 1982, in BYIL, vol. 53, 1982, pp. 509 ff., at 511.

74/ Some authors are of the view that humanitarian considerations prevent an injured State from terminating or suspending any part of a treaty providing forms of economic assistance to the offending State with a view to improving the conditions of a part of the latter's population. See A. Cassese, Il Diritto internazionale, op. cit., p. 271; and L. Boisson de Chazournes, op. cit., Chapter III, Part A, Section 3, para. 3.3, p. 153. Similarly, O.Y. Elagab, op. cit., p. 194, is of the opinion that consideration should be given to the "factor of dependence and reliance" by examining whether and to what extent measures have as their object commodities or services that are vital to the well-being of the State against which the measures are directed. This consideration would be of particular importance in the case of measures directed against developing countries. However, not all authors favour such a broad interpretation of the humanitarian restriction on countermeasures. For example, see B. Conforti, op. cit., p. 360.

75/ Rousseau, Chronique, RGDIP, 1980, p. 364.

to relieve human suffering, such as food, clothing, medicine, and medical supplies intended strictly for medical purposes". 76/ Following the murder of an Italian researcher in Somalia, the Foreign Affairs Committee of the Italian Parliament approved, on 1 August 1990, the suspension of any activities in Somalia "not directly finalized to humanitarian assistance". 77/

(25) The fact that humanitarian considerations are taken into account by States even in applying measures of mere retortion, in view of the fact that they consider the interest infringed not to be legally protected, makes the restriction for humanitarian reasons even more significant than it would be if it were limited to reprisals. 78/ The general applicability of this restriction is also a consequence of the character of countermeasures as essentially a matter between the States concerned and of the need to ensure that such measures have minimal effects on private parties in order to avoid collective punishment. 79/

76/ AJIL, vol. 80, 1986, p. 630. A very similar provision is contained in Executive Order No. 12722, by which the United States took measures against Iraq following the invasion of Kuwait (text in AJIL, vol. 84, 1990, p. 903, particularly Section 2 (b)).

77/ La Repubblica, 2 August 1990, p. 14.

78/ The prohibition of reprisals in time of war contained in the Geneva Conventions does not necessarily extend to measures of retortion. See, for example, the commentary to article 46 of Geneva Convention I, op, cit., p. 347 which, after recognizing the apparent desirability of prohibiting such measures, states as follows at p. 342:

> "What matters most, however, is that there should be no infringement of the rules of the Convention, that is to say, no interference with the rights of the persons protected, considered as a minimum. In the case of benefits which go beyond this minimum, it is admissible that a belligerent should not agree to accord them except on a basis of reciprocity. There might even be a risk of discouraging the granting of such benefits, if it were insisted that they should in no case be subject to retortion. It therefore appears more prudent to conclude that article 46 applies only to reprisals as defined at the beginning of the commentary on the present article."

79/ The collective punishment aspect of prohibited reprisals is discussed indirectly in the commentary to common article 3 of Geneva Convention I, op. cit., p. 54, as follows: "The taking of hostages, like reprisals, to which it is often the prelude, is contrary to the modern idea of justice in that it is based on the principle of collective responsibility for crime. Both strike at persons who are innocent of the crime which it is intended to prevent or punish."

(26) The humanitarian constraint on the ability of an injured State to resort to countermeasures is essentially determined by the fundamental requirements of humane treatment and basic human rights. Moreover, it is unprecedented developments in recent years, the law of human rights provides a minimum standard of humane treatment [illegible] or derogated from even in time of war or other public emergency. 80/ In this regard, the International Covenant on Civil and Political Rights recognizes the inviolability of certain rights by excluding them from the scope of application of the clause authorizing States Parties to derogate from their obligations under the Covenant in case of "public emergency which threatens the life of the nation". 81/ Article 27 of the American Convention on Human Rights prohibits the suspension of certain rights, the name of which derogations in case of public emergency, namely the right to juridical personality (art. 3), the right to life (art. 4), the right to humane treatment (art. 5), freedom from slavery (art. 6), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 5), freedom from ex post facto laws (art. 9), freedom of conscience and religion (art. 12), the rights of the family (art. 17), the rights of the child (art. 19), the right to nationality (art. 20), the right to participate in government (art. 23), or of the judicial guarantees essential for the protection of such rights" (ILM, vol. 9, 1970, p. 101).

nullum crimen sine lege, nulla poena sine lege (UNTS, vol. 213, p. 221). Regional human rights instruments such as the American Convention on Human Rights, 82/ and the European Convention on Human Rights, 83/ as well as doctrine 84/ provide further support for

80/ P. Reuter, op. cit., p. 463; W. Riphagen, Fourth Report, op. cit., p. 17, paras. 88-89; Ch. Dominicé, op. cit., p. 62; E. Zoller, "Quelques réflexions sur l'action entreprise par les Etats-Unis contre l'Iran", in Annuaire français de droit international, Paris, 1984, p. 376; O. Schachter, "Self-Help in International Law: US Action in the Iranian Hostages Crisis", in Journal of International Affairs, vol. 37, 1984, pp. 231-239; A. De Guttry, op. cit., p. 211.

81/ Article 4, International Covenant on Civil and Political Rights, [illegible]

82/ Article 27 of the American Convention on Human Rights prohibits the suspension of certain rights, the name of which derogations in case of public emergency, namely the right to juridical personality (art. 3), the right to life (art. 4), the right to humane treatment (art. 5), freedom from slavery (art. 6), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 5), freedom from ex post facto laws (art. 9), freedom of conscience and religion (art. 12), the rights of the family (art. 17), the rights of the child (art. 19), the right to nationality (art. 20), the right to participate in government (art. 23), or of the judicial guarantees essential for the protection of such rights" (ILM, vol. 9, 1970, p. 101).

83/ European Convention on Human Rights, art. 15, paragraph 2, on the right to life, article 3 on the right not to be subjected to torture, or to inhuman or degrading treatment or punishment, article 4, paragraph 1, on the right not to be subjected to slavery or servitude, or article 7 on the principle

84/ For a discussion of non-derogable rights as a matter of conventional law, see F. Lattanzi, Garanzie ..., op. cit., pp. 15 ff. According to Buergenthal, "an international consensus on core rights is to be found in the concept of 'gross violations of human rights' and in the roster of rights subsumed under it. That is to say, agreement today exists that genocide, torture, mass killings and massive arbitrary deprivations of liberty are gross violations" (Th. Buergenthal, "Codification and Implementation of International Human Rights", in Human Dignity. The Internationalization of Human Rights, L. Henkin editor, Aspen Institute for Humanistic Studies, New York, 1979, p. 17). In El Kouhene's opinion there is an "absolute minimum of the rights of a human being" which comprises at least the right to life, the right not to be subjected to torture or degrading treatment and the right not to be reduced to slavery or servitude. (El Kouhene, Les garanties fondamentales de la personne en droit humanitaire et droits de l'homme, Dordrecht-Boston-Lancaster, 1986, p. 109.) Medina Quiroga also believes that some human rights qualify as "core rights" (C. Medina Quiroga, The Battle of Human rights. Gross, Systematic Violations and the Inter-American System, Dordrecht-Boston-London, p. 13.) Meron does not exclude the possibility of distinguishing various categories of human rights, although he warns that "... except in a few cases (e.g. the right to life or to freedom from torture), to choose which rights are more important than others is exceedingly difficult" (T. Meron, "On a hierarchy of international human rights", AJIL, vol. 80, 1986, p. 4). The most essential among human rights may be those

the notion of essential or core human rights from which no derogation is permissible, although there are some differences in the enumeration of such rights.

(27) Subparagraph (d) prohibits conduct in derogation of basic human rights. The phrase "basic human rights" limits the scope of the text to the "core" of human rights which may not be derogated by way of countermeasures or otherwise. The Commission preferred the phrase "basic human rights", chosen by the International Court of Justice in its judgment in the Barcelona Traction case, 85/ to the phrase "fundamental human rights" which appears in Article 1, paragraph 3 of the United Nations Charter and the interpretation of which might be undesirably influenced by its use in the present context. Furthermore, the Commission used the phrase "derogate from" rather than "not in conformity with" to avoid duplicating the idea of prohibition which is the essence of article 14.

(28) Subparagraph (e) concerns the general restriction on the right of an injured State to resort to countermeasures resulting from the legal necessity to comply with a peremptory norm of international law. The Commission has implicitly recognized the existence of this restriction in Part One of the project: firstly, by including among the circumstances precluding wrongfulness the fact that "the act constitutes a measure legitimate under international law ... in consequence of an internationally wrongful act" (art. 30); 86/ secondly, when it has stressed the inviolability of peremptory norms even when there is the consent of the State in favour of which the infringed obligation exists (art. 29, para. 2); and thirdly, in case of a state of necessity (art. 33, para. 2 (a)). This is consistent with the Vienna Convention on the Law of Treaties which recognizes the unique character of a peremptory norm as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted". Furthermore, the peremptory norm restriction on the ability of an

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the promotion and observance of which are the object of customary international law.

85/ I.C.J. Reports, 1970, p. 22.

86/ G. Gaja, "Jus cogens beyond the Vienna Convention", Hague Rec., vol. 172, 1981-III, p. 297.

injured State to resort to countermeasures is widely recognized in the contemporary doctrine since the Second World War. 87/

(29) The formulation and structure of subparagraph (e) are intended to indicate its non-exhaustive character and to avoid undesirable a contrario interpretations. Thus, the phrase "any other conduct" is intended to indicate that some types of conduct covered by subparagraphs (a) to (d), notably the threat or use of force, depart from peremptory norms but does not specify

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87/ F. Lattanzi, Garanzie ..., op. cit., pp. 306 ff; P Reuter, op. cit., p. 463; K. Zemanek, "La responsabilité des Etats pour faits internationalement illicites ainsi que pour faits internationalement licites", in Responsabilité internationale, Paris, 1987-1988, p. 84; G. Gaja, "Jus cogens beyond the Vienna Convention", Haque Rec., vol. 172, 1981-III, p. 297; D. Alland, "International Responsibility and Sanctions: Self-Defence and Countermeasures in the ILC Codification of Rules Governing International Responsibility", in M. Spinedi, B. Simma, eds., United Nations Codification of State Responsibility, New York, London, Rome, 1987, p. 185; O.Y. Elagab, op. cit., p. 99; and L.A. Sicilianos, op. cit., pp. 340-344.

whether all the types of conduct listed in those subparagraphs depart from such norms. The Commission is aware that subparagraph (e) may not be strictly necessary since, by definition, jus cogens rules may not be departed from by way of countermeasures or otherwise. The Commission, however, felt that a reference to jus cogens would ensure the gradual adjustment of the articles in accordance with the evolution of the law in this area and would therefore serve a useful purpose.